FEB 15 2001

No. 99-1977

FEB 16 2001

IN THE

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ and IN DEFENSE OF ANIMALS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Summary of Argument	2
ARGUMENT	3
THE QUALIFIED IMMUNITY DEFENSE MERGES WITH THE MERITS OF THE CASE IN AN EXCESSIVE FORCE SUIT BROUGHT UNDER BIVENS OR IN A SECTION 1983 CASE	3
A. The Theory of Qualified Immunity	3
B. The Inapplicability of Qualified Immunity In Excessive Force Cases	8
1. Suits Under the Fourth Amendment	8
a. There is Less Justification for Recognizing Qualified Immunity in Fourth Amendment Cases.	9
b. Since Probable Cause Determinations Involve a Mixed Question of Law and Fact, There Is Some Justification for Recognizing a Qualified Immunity Defense in Those Situations	10

2. The Qualified Immunity Defense Should Not Apply in Excessive Force Situations 11

a. The Definition of Excessive Force 12

b. Under the Definition of Excessive Force, Both Police and Juries Are Given Great Latitude to Consider the Reasonableness of the Officer's Actions 13

c. There is No Reason to Apply Qualified Immunity in Excessive Force Cases. 15

d. There Are Considerable Procedural Difficulties in Recognizing Qualified Immunity in Excessive Force Situations . 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Page

Anderson v. Creighton, 483 U.S. 635 (1987) 4

Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989) . . 6

Bilida v. McCleod, 211 F.3d 1668 (1st Cir. 2000) 8

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1972) 2, 3, 4

Connick v. Myers, 461 U.S. 138 (1983). 8

Davis v. Scherer, 468 U.S. 183 (1984) 6

Denno v. School Board of Volusia County, Fla, 218 F.3d 1267 (11th Cir. 2000). 7

Falvo v. Owasso Independent School District, 220 F.3d 1200 (10th Cir. 2000) 6

Frazell v. Flanigan, 102 F.3d 877 (7th Cir. 1996) 15

Graham v. O'Connor, 490 U.S. 386 (1989) 2, 12,13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5

Herring v. Keenan, 218 F.3d 1171 (10th Cir. 2000) 7

Holt v. Artis, 843 F.2d 242 (6th Cir. 1988) 15, 16

Johnson v. Jones, 515 U.S. 304 (1995) 18

Kalka v. Hawk, 215 F.3d 90 (D.C. Cir. 2000) . . . 7

Lassiter v. Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994) 6

Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000). . . 7

Maggio v. Sipple, 211 F.3d 1346 (11th Cir. 2000) 7

McNair v. Coffey, 234 F.3d 352 (7th Cir. 2000) 5, 9, 15

Monroe v. Pape, 365 U.S. 167 (1961) 4

Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977). 8

Pickering v. Board of Education, 391 U.S. 563 (1968) 8

Scott v. District of Columbia, 101 F.3d 748 (D.C. Cir. 1966) 15, 17

Snyder v. Trepagnier, 142 F.2d 791 (5th Cir. 1988) 18

Street v. Parham, 929 F.2d 537 (10th Cir. 1991) 15, 16

Thompson v. Keohane, 516 U.S. 99 1995) 10

Trotter v. Regents of University of New Mexico, 219 F.3d 1179 (10th Cir. 2000) 7

Washington Initiative Now v. Rippie, 213 F.3d 1132 (9th Cir. 2000) 7

Wilson v. Layne, 526 U.S. 603 (1999) 5, 6

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 1, 2, 4

MISCELLANEOUS

Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 9

Schwartz and Pratt, *Section 1983 Litigation: Jury Instructions,* 15

Telford Taylor, *Two Studies in Constitutional Interpretation* 9

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 10

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted in support of Respondents Elliot M. Katz and In Defense of Animals. Letters of consent to the filing of this Brief have been lodged with the Court, by Petitioner and Respondents, pursuant to Rule 37.3. [1]

INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York is a professional association of approximately 21,000 attorneys. While the majority of its members practice in New York City, the Association has members in nearly every state and in over fifty countries. The Association is chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Civil Rights, has been vigilant in insuring that the civil rights and civil liberties of all Americans are fully protected and that effective remedies exist to protect and vindicate such rights. It is particularly concerned that 42 U.S.C. § 1983 and actions under *Bivens* remain as effective weapons against abuse of power. The Committee has published a variety of reports and has held numerous meetings dealing with effective means of limiting the misuse of power by government officials, particularly law enforcement officers.

The Association believes that expanding the

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[1] Pursuant to Rule 37.6, this brief was authored, prepared and paid for in its entirety by the Association of the Bar of the City of New York.

qualified immunity defense to excessive force cases will raise a difficult barrier to full protection of the constitutional rights of all citizens. For these reasons, the Association has submitted this brief.

SUMMARY OF ARGUMENT

To some extent, the qualified immunity defense undercuts the purpose of 42 U.S.C. § 1983 and actions against federal officials brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391-92 (1971), namely to permit a damages remedy against officials who misuse their governmental power. The rationale of recognizing a good faith defense is that government officials should not be held personally liable in damages for actions which, at the time, they did not realize were unlawful. Given the complexity in the legal definition of many constitutional rights, officials should not be personally held liable unless the right they are accused of violating was clearly established by definitive decisions of an appropriate court or by specific legal directives.

However, certain areas of constitutional law are much easier for officials to understand and obey. In particular, many aspects of Fourth Amendment law involve the application of broad community standards, which government officials must adhere to at their peril. While issues involving probable cause may require guidance from the courts, the question of what force is considered excessive is one that does not involve difficult standards of interpretation. Under this Court's decision in *Graham v. O'Connor*, 490 U.S. 386, 396-97 (1989), force applied by an arresting officer is actionable under the Fourth Amendment if the force was objectively unreasonable. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is

whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." But this is precisely the same inquiry required under the qualified immunity doctrine. For this reason, the Court below properly found, as did four other Circuits, that the issue on the merits in an excessive force case merges with the qualified immunity doctrine. There is no need for a second question to be asked of the jury or considered by the court, after the fact-finder has determined that the force was objectively unreasonable. This Court should adopt that rule.

ARGUMENT

THE QUALIFIED IMMUNITY DEFENSE MERGES WITH THE MERITS OF THE CASE IN AN EXCESSIVE FORCE SUIT BROUGHT UNDER BIVENS OR IN A SECTION 1983 CASE

A. The Theory of Qualified Immunity

This Court has emphasized the importance of recognizing a damages action against a federal agent misusing his or her authority. In the landmark case of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 391-92 (1971), Justice Brennan, speaking for the Court, wrote:

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting -- albeit

> unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. [2]

In *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), this Court emphasized that a suit for damages may be the only practical way to vindicate constitutional guarantees either under 42 U.S.C. § 1983 or under *Bivens*. But it also noted:

> [P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. . . .
>
> Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could

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[2] Justice Harlan made the same point in his concurring opinion in *Bivens*: "The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind," 403 U.S. at 409; as well as in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 196 (1961), "deprivation of a constitutional right [by officials misusing their authority] is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."

> reasonably have been thought consistent with the rights they are alleged to have violated.

This Court has therefore concluded that Federal or state officials should not be held liable in a damages suit for actions taken within the scope of their discretionary duties unless they violated clearly established constitutional rights known to a reasonably informed official. As this Court noted in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982):

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

There is a significant social cost in affording qualified immunity to government officials, both state and federal, [3] as Judge Easterbrook noted recently in *McNair v. Coffey*, 234 F.3d 352, 356 (7th Cir. 2000).

> Let us never forget that immunity in § 1983 cases is a judicial invention. Congress provided for liability in absolute terms. Public officials who violate the Constitution or laws must pay; immunity is anti-textual. The justification for immunity is that the scope of liability has grown like topsy since 1871, when § 1983 was enacted, and that to carry out what Congress must have meant a court may depart from what Congress

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[3] The qualified immunity test is identical for both state and federal officials, see *Wilson v. Layne*, 526 U.S. 603 (1999)

> said. That's a treacherous path for any judge to take, though history may provide a map.

On the other hand, there is certainly a plausible argument that government officials untrained in the law should not be held personally liable simply because they did not know the full range of constitutional law as well as lawyers or judges. The Eleventh Circuit noted in *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1152, fn.8 (11th Cir. 1994):

> Even if some legal expert would have then concluded that a hearing was required [before Vice-President of University was fired], defendants would still be due qualified immunity if reasonable university officials would not have known about it. *Davis [v. Scherer*, 468 U.S. 183] 196 n. 13, [1984] ("unfair and impracticable" to hold public officials to the same level of knowledge as trained lawyers); *Barts [*v. *Joyner,* 865 F.2d 1187, 1193 (11th Cir.1989),] ("[w]e cannot realistically expect that reasonable police officers know more than reasonable judges about the law").

As a result, courts are often required to make detailed analysis of the scope of a constitutional right, how broadly the right is defined, and when its contours were established. See *e.g. Wilson v. Layne*, 526 U.S. 603 (1999)(law was not clearly established that media could not be asked to "ride along" with police on arrest or search; regulations permitted "media ride-alongs" and no definitive decision prohibited such actions); *Falvo v. Owasso Independent School District*, 220 F.3d 1200 (10th Cir. 2000)(Family Education Rights and Privacy Act right not to have school grades declared in open class not

clearly established; teachers entitled to qualified immunity when they did so); *Trotter v. Regents of University of New Mexico*, 219 F.3d 1179 (10th Cir. 2000)(school officials entitled to qualified immunity in suit by student that he had property or liberty right in continued enrollment at medical school and that he did not receive sufficient process in challenge to academic deficiency decision by school); *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000)(officer's staging of "perp walk" whereby arrestee paraded in front of television cameras for no reason violated Fourth Amendment; but right was not clearly established previously; officer entitled to qualified immunity); *Denno v. School Bd. of Volusia County, Fla*, 218 F.3d 1267 (11th Cir. 2000)(law unclear on whether student display of confederate flag was protected by First Amendment; contrary precedents existed; school officials entitled to qualified immunity); *Herring v. Keenan*, 218 F.3d 1171 (10th Cir. 2000)(law unclear on whether probation officer's disclosure of probationers' HIV positive condition was violation of constitutional right to privacy; officer entitled to qualified immunity); *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000)(law unclear on whether prison officials must allow humanistic religion to be practiced in prison; entitled to qualified immunity); *Washington Initiative Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000)(law unclear on right of state official to require disclosure of names and addresses of paid initiative petition collectors; officials entitled to qualified immunity); *Maggio v. Sipple*, 211 F.3d 1346 (11th Cir. 2000)(employee testified at grievance hearing of supervisor and claimed she was retaliated against because of her testimony; but testimony was not on a matter of public concern since the purpose of her testimony was not to inform the public about a deficiency in the office but to support her supervisor at the grievance; in any event, defendants entitled to qualified

immunity since law unclear on public concern nature of speech); *Bilida v. McCleod*, 211 F.3d 166 (1st Cir. 2000)(officers entitled to qualified immunity in seizing raccoon without a warrant from owner who did not have permit; although final entry to seize animal may not have been proper).

B. *The Inapplicability of Qualified Immunity In Excessive Force Cases*

Even though there is a plausible historic and policy reason for recognizing a qualified immunity defense when there is doubt about the scope of a constitutional right, suits for vindication of Fourth Amendment rights involve different considerations. For example, when First Amendment rights are examined, there is a whole range of difficult legal issues concerning what kind of speech is protected by the Constitution, such as what is speech on a matter of public concern, *see Connick v. Myers*, 461 U.S. 138 (1983); how does one show whether speech was a substantial or motivating factor in the decision to take adverse action against an individual, *see Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977); what government justification will permit sanctioning government employees for their speech, *see Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). These questions often require an awareness of specific holdings of this Court on difficult and thorny legal issues.

1. Suits under the Fourth Amendment

When the Fourth Amendment is involved, the situation is generally different.

a. There is Less Justification for Recognizing Qualified Immunity in Fourth Amendment Cases

First of all, historically, there was no immunity for Fourth Amendment invasions by government authorities. They were sued for trespass, false arrest or false imprisonment and for assault and battery and forced to pay damages if their actions were not justified, without the benefit of any immunity defense. Judge Easterbrook explains:

> Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of. A principal function of the fourth amendment was to protect private parties from overreaching by the police by limiting the availability of advance judicial approval (that is, of a warrant) as a defense, to ensure that citizens could recover unless arresting or searching officers could establish the reasonableness of their conduct. See Telford Taylor, *Two Studies in Constitutional Interpretation* 24-47 (1969); Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 3-17, 40-43 (1997). All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability. Thus a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases.

McNair v. Coffey, 234 F.3d 352, 356 (7th Cir. 2000).

Secondly, the core legal issue in Fourth Amendment cases is generally a broad question of reasonableness, rather than a precise legal definition laid down by this Court, such as what constitutes speech on a matter of pubic concern. Reasonableness, like negligence, involves a community standard, which all citizens are bound to follow, regardless of their knowledge of the precise legal definition laid down by a court. See *Thompson v. Keohane*, 516 U.S. 99, 114 fn. 13 (1995)

> Traditionally, our legal system has entrusted negligence questions to jurors, inviting them to apply community standards. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 37, pp. 235-237 (5th ed.1984). For that reason, "[t]he question usually is said to be one of fact," although "it should be apparent that the function of the jury in fixing the standard differs from that of the judge only in that it cannot be reduced to anything approaching a definite rule." *Id.*, at 237.

b. Since Probable Cause Determinations Involve a Mixed Question of Law and Fact, There Is Some Justification for Recognizing a Qualified Immunity Defense in Those Situations

It is certainly true that issues of "probable cause" may involve legal definitions and require guidance from the courts: does an anonymous phone call provide probable cause, what level of probability justifies a search or a stop, when do exigent circumstances excuse a warrantless search, what is the permissible scope of a search after probable cause has been found.

For that reason, probable cause determinations under the Fourth Amendment may trigger a qualified immunity defense. See *Anderson v. Creighton*, *supra*, 483 U.S. at 640-41.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . in the light of pre-existing law the unlawfulness must be apparent. . . . We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials-- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.

2. The Qualified Immunity Defense Should Not Apply in Excessive Force Cases

But in an excessive force case, the difficult and thorny legal issues of definition do not exist. The standard of excessiveness is one that a jury decides, based on its knowledge of a broad community standard, applying strict instructions that a judge has imposed on them. As this Court acknowledged in *Thompson*: the "function of the jury in fixing the standard differs from that of the judge only in that it cannot be reduced to anything approaching a definite rule."

a. The Definition of Excessive Force

In *Graham v. O'Connor*, 490 U.S. 386, 396-97 (1989), this Court laid out the basic definition of "excessive force."

> With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d, at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . . As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . .An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

This definition appears in almost all jury instructions given in excessive force cases, as noted below.

b. Under the Definition of Excessive Force, Both Police and Juries Are Given Great Latitude to Consider the Reasonableness of the Officer's Actions

What this definition shows is that police officers are given enormous latitude in deciding the level of force needed to make an arrest. The definition is embodied in jury instructions given in excessive force cases, as noted below. The instructions recognize that police have to make split second decisions about the force necessary in a given situation. Their actions are judged on the basis of the facts in front of them at the time in a fluid situation. The inquiry is an objective one and the officer's actual state of mind is an irrelevancy.

Jury instructions on excessive force already encompass whatever extra level of protection a police officer is entitled to under the "qualified immunity" defense. In a typical jury instruction on excessive force, jurors are asked to take account of the "objective reasonableness" of an officer's action:

> [I]n making a lawful arrest police officers have the right to use such force as is necessary under the circumstances to effect the arrest, and at the same time to protect themselves or others from physical harm. Whether or not the force used in making an arrest was reasonable is an issue to be determined by you, on the basis of that degree of force a reasonable and prudent police officer would have applied in effecting the arrest, under the circumstances in this case.

* * *

The question before you is *whether the actions of the defendant police officer on [date] were objectively reasonable, meaning what a reasonably prudent police officer would have done under similar conditions in light of the facts and circumstances confronting the officer. You are to make this determination without regard to the police officers' underlying subjective intent or motivation.* That means that "evil intentions" will not be considered excessive force if the force used was in fact reasonable. On the other hand, an officer's good intentions will not make the use of excessive force constitutional. *The reasonableness of a particular use of force must be judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight. In determining whether the force exercised was reasonable, you should consider the facts and circumstances as you find them to be, including the severity of the offenses at issue, whether the plaintiff posed an immediate threat to the safety of the police officers or others, and whether the plaintiff was actively resisting arrest at the time the alleged excessive force was applied.*

Now the Constitution must not be trivialized. Not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make difficult split-second judgments in circumstances that are sometimes

> tense, uncertain, dangerous, and rapidly evolving, about the amount of force that is necessary in a particular situation.

See Schwartz and Pratt, *Section 1983 Litigation: Jury Instructions*, § 7.01 at 7-5. (emphasis added)

c. There is No Reason to Apply Qualified Immunity in Excessive Force Cases.

If a jury is given this instruction and finds that an officer engaged in excessive force, it has also made the determination that the officers' actions were not "objectively reasonable," which is the same determination to be made on qualified immunity. That is why the Tenth, Ninth, Seventh, Sixth and D. C. Circuits have all held that the two questions "merge" and a separate qualified immunity defense should not be applied See *McNair v. Coffey*, 234 F.3d 352, 355-56 (7th Cir. 2000):

> *Frazell* [*v. Flanigan*, 102 F.3d 877 (7th Cir.1996)] holds that "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." 102 F.3d at 886-87. This conclusion has the support of at least four other circuits. *Holt v. Artis*, 843 F.2d 242, 246 (6th Cir.1988); Katz v. United States, 194 F.3d 962 (9th Cir.1999), *cert. granted under the name Saucier v. Katz*, --- U.S. ----, 121 S.Ct. 480, --- L.Ed. 2d ---- (2000); *Street v. Parham*, 929 F.2d 537, 540, 541 n. 2 (10th Cir.1991); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C.Cir.1996).

In *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991), the Tenth Circuit reversed a jury verdict for a defendant police officer in an excessive force case where the trial court instructed that even if the jury found that the defendants had used excessive force, they still might be entitled to qualified immunity if they did not know that their actions violated federal law. The court held that the qualified immunity charge was error because "[n]o officer could reasonably believe that the use of unreasonable force did not violate clearly established law." 929 F.2d at 540. Thus, "[o]nce the jury concluded that . .. excessive force had been used, the inquiry was over." *Id.* More to the point, the court noted that in the specific context of excessive force claims, "once a factfinder has determined that the force used was unnecessary under the circumstances, any question of objective reasonableness has also been foreclosed." *Id.* at 541 n.2.

In *Holt v. Artis,* 843 F.2d 242, 246 (6th Cir. 1988), the plaintiff brought a § 1983 action against several law officers for use of excessive force. After a jury returned a verdict in favor of the officers, the plaintiff appealed, arguing that three specific jury instructions had been erroneous. Instead, the Sixth Circuit vacated the jury verdict and remanded on the basis of an instruction not raised by either party. Invoking its right to review an issue not assigned as error by any party in the face of "obvious and prejudicial error," the court held that the defendants' affirmative defense of subjective good faith should not have been put to the jury as a question of fact. The court cautioned that if the defendants "subjected [the plaintiff] to more force than was reasonably necessary under the circumstances, then they are liable for his injuries." *Id.* at 246. Put simply, what the officers subjectively believed "is not at issue." *Id.*

In *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996), the D.C. Circuit similarly held that subjective good faith is not a relevant consideration. The *Scott* court held that "the issues of whether an officer used excessive force and whether an officer is entitled to qualified immunity are determined according to a single standard." *Id.* That is, "[f]or both issues, the proper question for the jury is whether the excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions." *Id.* (internal quotations omitted).

The only justification offered by the Solicitor General for imposing a qualified immunity defense in an excessive force case is that qualified immunity should apply across the board to protect government officials from frivolous suits and that the qualified immunity defense was applied in other Fourth Amendment contexts, such as the probable cause determination made in *Anderson*. However, as we show above, there is a significant difference in the legal exploration of probable cause determinations, as opposed to excessive force situations. Probable cause involves a mixed question of fact and law, unlike the situation in an excessive force case, where the objective reasonableness of an officer's actions entails the application of a community judgment.

d. There Are Considerable Procedural Difficulties in Recognizing Qualified Immunity in Excessive Force Situations

There are many practical problems in trying to recognize a qualified immunity defense in an excessive force case. Generally, the question of whether force was excessive involves the weighing of many factual issues, such as did the plaintiff resist, did he have or seem to

have a weapon, what alternatives were available to the officer? Under *Johnson v. Jones*, 515 U.S. 304, 313 (1995), these questions of "evidentiary sufficiency" preclude the grant of summary judgment on qualified immunity grounds.

Second, who decides the question of "qualified immunity" in an excessive force case and when must it be decided? If the issue is not decided before trial for the reasons outlined in *Johnson*, then the question arises whether the jury should determine immunity, as the Fifth Circuit held in *Snyder v. Trepagnier*, 142 F.2d 791 (5th Cir. 1998). But if the jury finds there was excessive force, since the use of force was not objectionably reasonable, how can it also find that the officers are entitled to qualified immunity, because the force was objectionably reasonable, which is the test to be applied on qualified immunity? Are not such findings inconsistent, as this Court suggested when it granted certiorari in *Snyder v. Trepagnier*, 525 U.S. 1098 (1999), *case dismissed*, 526 U.S. 1083 (1999) and asked the parties to brief the following questions:

> 1. Whether a jury finding that a constitutional violation incurred by use of excessive force in an arrest necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable? 2. Whether a reviewing court may reconcile apparent inconsistencies in special jury verdicts despite possible defects in special interrogatories submitted, by determining whether, upon review of the entire record, the verdict as a whole was reasonable and supported by the evidence?

If the qualified immunity issue is decided by a court, after a jury has found that excessive force was used, then a Court is overturning the jury determination of the issue, which it may not do if there is any reasonable basis for the jury findings.

For both constitutional and practical reasons, qualified immunity cannot be applied once a jury has determined the force used by an officer was excessive.

CONCLUSION

For the reasons stated above, *amicus curiae*, the Association of the Bar of the City of New York requests that the decision below be affirmed.

Dated: New York, N.Y.
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